

Arthur L. Davis v. U.S. General Accounting Office

Docket No.: 86-701-13-87

Date of Decision: April 7, 1988

Cite as: Davis v. GAO (4/7/88)

Before: James, Chair; Cappello, Kaplan, Kaufmann and Weinstein, Members

Motion to Dismiss

Settlement Agreements

Estoppel

DECISION

On August 18, 1987, Petitioner filed a petition for review with the Board. In his petition for review, Petitioner charged the Agency with racial discrimination and appealed the final agency decision issued by the General Accounting Office (Respondent) on March 9, 1987. The matter is now before the Board on Respondent's motion to dismiss and the Petitioner's opposition thereto.

BACKGROUND

The procedural underpinnings of this case began on July 26, 1982, when Petitioner, a GS-12 Evaluator in Respondent's San Francisco Regional Office, filed a racial discrimination complaint against Respondent's San Francisco Regional Office. The complaint alleged disparate treatment in regards to 1) comments allegedly made by management officials of Respondent; 2) a lack of recognition of Petitioner's work contributions; 3) the length of time between Petitioner's performance appraisals and counseling; 4) Petitioner's rating for job vacancy certificates; 5) alleged discriminatory job assignments; and 6) alleged discriminatory denial of promotion from GS-12 to GS-13 Evaluator.

On August 24, 1982, Respondent's Civil Rights Office rejected Petitioner's complaint on the basis that Petitioner's action was subsumed by a prior pending class action complaint, captioned Fogle v. GAO. In Fogle, Respondent was charged with discrimination against black professional employees in all terms and conditions of employment, including recruitment and selection, work assignments, and promotions. Petitioner appealed the decision of the Civil Rights Office to this Board.

At the time of Petitioner's appeal to this Board, the Fogle class action was being processed by the Equal Employment Opportunity Commission (EEOC). During the investigation of Petitioner's appeal, the General Counsel of the Personnel Appeals Board wrote the EEOC and requested a ruling on the scope of the Fogle class action complaint and its effect on Petitioner's claims. By letter dated March 1, 1983, EEOC advised the PAB General Counsel and Respondent's Civil Rights Office that Petitioner was a member of the Fogle class for all aspects of his complaint that were common to the class complaint. However, EEOC also ruled that Petitioner should be allowed to pursue his individual allegations as a matter for individual relief. As a result, Petitioner's complaint was referred back to Respondent's Civil Rights Office for appropriate processing. On the following day, August 25, 1983, Respondent's Civil

Rights Office advised Petitioner that, after reviewing his case file, it had again determined that his complaint was subsumed by the Fogle class action. Accordingly, Respondent refused to give Petitioner a final agency decision on the merits of Petitioner's July 26, 1982, complaint. Petitioner subsequently, on October 28, 1983, filed a petition for review of Respondent's decision not to give him a final agency decision.

Three months after filing the petition for review, Petitioner filed a second individual complaint on January 5, 1984, with Respondent's Civil Rights Office. In the second complaint, Petitioner alleged reprisal for having filed the first complaint, new instances of Respondent's failure to promote him, and other forms of disparate treatment. On February 27, 1984, Respondent's Civil Rights Office notified Petitioner that his new complaint was also subsumed by the Fogle class action, and that Respondent would, likewise, not process the second complaint. Petitioner appealed the Civil Rights Office's denial of his second complaint to this Board on March 26, 1984.

On April 4, 1984, the Board consolidated Petitioner's 1982 and 1984 complaints. Cross-motions for summary judgment were filed by Petitioner and Respondent on April 26, 1984. After deliberation, the Presiding Member for the Board entered a decision in the consolidated cases on August 3, 1984. The Presiding Member held that Petitioner was a member of the Fogle class, and Petitioner's 1982 and 1984 charges of discrimination were individual and not class claims. The Presiding Member ordered Respondent to process Petitioner's claims and issue a final agency decision on the two complaints. In March 1985, consistent with the August 13, 1984, order of the Presiding Member, Respondent completed investigation of Petitioner's complaints; however, Respondent did not issue a final agency decision.

On July 16, 1985, the Fogle class action was consolidated for settlement with a second class action complaint, Mason v. GAO. The Mason class action complaint challenged the Merit Selection Plan, the promotional plan for Respondent's professional employees. Respondent had accepted the Mason complaint as a class action complaint on March 12, 1984. Petitioner filed a claim for relief under the Fogle/Mason settlement on August 26, 1985, asserting a claim for the period February 1977 through September 1985. On September 24, 1985, Respondent's Civil Rights Office issued a proposed final agency decision concluding that Petitioner was a member of the Fogle/Mason class, and not entitled to any relief under his individual claims, but that Petitioner could be paid for attorney fees and costs associated with his proceedings before the PAB and up to the time of the final agency decision on his complaints.

As part of the settlement, Petitioner executed the standard form release prepared by Respondent for class members in the Fogle/Mason case, settling his complaint on October 24, 1985. Respondent received Petitioner's signed release on October 31, 1985. Shortly thereafter, Petitioner received a check from Respondent in the amount of \$20,489.35 and on November 25, 1985, Respondent's Civil Rights Office advised Petitioner that Petitioner's execution of the Fogle/Mason settlement release made issuance of a final agency decision unnecessary.

In August of 1986, Petitioner filed a petition for extraordinary relief with this Board. On February 6, 1987, we issued a summary order requiring Respondent to issue a final agency decision on Petitioner's 1982 and 1984 complaints. In accordance with that order, Respondent issued a final agency decision on March 9, 1987. The final agency decision held that the individual complaints which the President Member ordered processed in August 3, 1984, were discharged by Petitioner when he accepted relief under the Fogle/Mason settlement and signed a release therefor. Petitioner then filed his petition for review with the Board, appealing the final agency decision of March 9, 1987.

ANALYSIS

The gravamen of Petitioner's argument set forth in his petition for review is that, in accepting relief under the Fogle/Mason settlement, he did not waive his individual claims which this Board had previously ordered the Agency to process. Respondent contends in its motion to dismiss that the plain language of the release signed by Petitioner on October 24, 1985, clearly constituted a waiver of any and all EEO claims Petitioner had pending in the Respondent's civil rights process. We agree.

In passing on a motion to dismiss, the facts in the case must be viewed in the light most favorable to the party opposing the motion. Scheuer v. Rhodes, 416 U.S. 232 (1974). A motion to dismiss can only be sustained if it appears that the Petitioner can prove no set of facts on which he may prevail. Conley v. Gibson, 355 U.S. 41, 45 (1957). The facts in this case are clear. Petitioner filed individual claims of employment discrimination on two occasions against Respondent while there were pending two independent class action complaints encompassing claims similar to Petitioner's pending claim against Respondent. This Board has, on two occasions, ruled that Petitioner was both in and out of Fogle/Mason class action complaints and, therefore, was eligible to pursue his individual claims while being part of the class-wide relief. The question we must consider is whether or not, in executing his release in the Fogle/Mason settlement, and thereby taking part in the relief accorded to the Fogle/Mason class members, Petitioner waived his right to proceed with his individual claims of discrimination against Respondent.

It is well settled that a party may waive his cause of action under Title VII as part of a voluntary settlement. Alexander v. Gardner-Denver, 415 U.S. 36, 52 n.7 (1974). In a case where waiver and settlement are issues, the responsibility of this Board is to determine whether the employee's consent to the settlement was express, knowing, and voluntary. Id. In this case, it is undisputed that Petitioner executed a settlement release in the Fogle/Mason settlement, and received a cash award in exchange for execution of the settlement release. The language of the release executed by Petitioner in this case states that Petitioner, through signing the settlement release, released Respondent from all "legal or equitable claims arising out of the subject matter of these [Fogle/Mason] actions or any other individual or class-wide legal, equitable, or administrative claims or causes of action arising out of alleged employment discrimination on the basis of race in evaluator and evaluator-related jobs at the [GAO]." The clear language of the release signed by Petitioner contained at least two other clauses stating that the signing of the release would constitute a waiver of any other claims for relief growing out of alleged discrimination in Evaluator or Evaluator-related jobs in Respondent.

It is also undisputed that Petitioner was represented by counsel during the period of August 1985, the time in which he received Respondent's offer of settlement for the Fogle/Mason class, and also when he received Respondent's proposed final agency decision on September 24, 1985. Petitioner verified in the release that he had consulted an attorney prior to signing the release and that he was executing the release of his own free will.

Petitioner's primary argument is that, when he received his claim notice in the Fogle/Mason settlement, he was required to accept the settlement offer within 30 days, or lose his right to relief. Petitioner further argues that, had Respondent complied with its own regulations (Order 2713.2, Section 6), a final agency decision would have been issued on his individual charges, and Petitioner would have been entitled to relief under the final agency decision as well as the Fogle/Mason settlement. By failing to follow its own procedures under 2713.2, Petitioner argues, Respondent is now estopped from arguing waiver or settlement in this instance.

Generally, a waiver is an intentional abandonment of a known right. Alexander v. Gardner-Denver, *supra*; U.S. v. Trucking Employers, Inc., 561 F.2d 313 (D.C. Cir. 1977). In fact patterns such as this, where a Petitioner signs a release and accepts the settlement payment, there exists a high presumption of intent to settle or abandon the right to continue litigation. The presumption of intent to settle and waive all claims, even though rebuttable, has even more credibility where there is no evidence in the record that a Petitioner even attempted to negotiate a different release with the Respondent, or offered a counter-release with language more suited to his unique circumstances. Nor is there any evidence before us that Petitioner requested agency decision and compare the results with the proposed relief under the Fogle/Mason settlement. Petitioner did none of these things; instead, it appears that Petitioner now wants this Board to require Respondent to render a final agency decision on claims Petitioner has already settled.

Therefore, taking the facts in the light most favorable to Petitioner, we conclude that Petitioner's signing of the Fogle/Mason settlement release, and acceptance of relief thereunder, constituted a valid waiver of all of his claims, individual and class, such that he has extinguished his right to any further relief growing out of his EEO complaints of 1982 and 1984.

Accordingly, the Respondent's motion to dismiss is GRANTED, and the petition for review is dismissed.